

STAFF REPORT for ITEM B

ADMINISTRATIVE CIVIL LIABILITY ORDER FOR FLORIN PERKINS LANDFILL, INC. FLORIN PERKINS LANDFILL SACRAMENTO COUNTY

Introduction

A group of family trusts, led by Nancy Cleavinger, Trustee, owns the Florin Perkins Landfill property. Florin Perkins Landfill, Inc. (FPLI or operator) operated the landfill until early this year. The landfill is regulated under Waste Discharge Requirements (WDRs) Order No. 95-196, which names both FPLI and Nancy Cleavinger, Trustee, et al, as Discharger.

In 2003, the Executive Officer issued a California Water Code (CWC) Section 13267 Order to the Discharger for failure to submit technical reports required by the WDRs for a groundwater investigation at the site. The reports are required by the WDRs whenever a release of waste from a landfill is confirmed; in this case, the detection of Freon 11 in groundwater. In March 2005, the Executive Officer issued Administrative Civil Liability (ACL) Complaint No. R5-2004-0503 because the operator failed to comply with the Section 13267 Order. The ACL Complaint named FPLI but not the owner because FPLI had exclusive control of site operations under its contract with the owner. Also during this period, the owner terminated FPLI as operator and evicted it from the site for breaches of its contract related to regulatory noncompliance. The eviction was finalized in February 2005.

Site Information

Florin Perkins Landfill is a 106-acre unclassified, unlined landfill on Florin Perkins Road in the City of Sacramento. The landfill is on a 160-acre parcel that also includes a transfer station, a materials recovery facility, and associated access roads and structures. The site occupies a former gravel quarry. The WDRs only authorize the discharge of inert wastes into the landfill. To date, approximately half of the total disposal area has been filled. The unfilled portion of the permitted landfill area is used for soil blending operations and a chip and grind facility.

Historical Overview

FPLI operated the landfill (and other onsite facilities) from 1994 until February 2005 and has a long history of WDR violations. These violations include the discharge of unauthorized wastes to the landfill; failure to conduct groundwater monitoring; failure to submit groundwater monitoring and technical reports; the discharge of wastes to ponded water; and failure to maintain precipitation and drainage controls. Regional Board staff have conducted numerous compliance inspections and issued numerous staff enforcement letters and Notices of Violation regarding these violations in the past several years. Some of the violations are continuing and are subject to further enforcement action. The Local Enforcement Agency (LEA) also has multiple enforcement actions against the operator related to the landfill, materials recovery facility, chip and grind and soil blending operations at the site. In addition, the Department of Toxic Substances Control is conducting a criminal investigation into alleged hazardous waste disposal violations by the operator and last summer executed a search warrant at the site as well as the operator's business and home.

In addition to the above violations, groundwater quality at the site has been impacted. Elevated concentrations of total dissolved solids (TDS) and bicarbonate in groundwater have been historically

detected in wells at the site. Carbon dioxide has been reported in gas samples from the landfill. Carbon dioxide from landfill gas can dissolve into groundwater and increase TDS and bicarbonate concentrations. In addition, monitoring results from a new well installed at the site in 2002 confirmed the presence of the volatile organic compound (VOC) trichlorofluoromethane (Freon 11) at concentrations of approximately 8 µg/L. While the Freon 11 was detected above the background concentration of nondetect, it is below the California primary MCL of 150 µg/L.

Recent Violations

Violation of WDR Order No. 95-196

Recent violations of the WDRs include the operator's failure to submit technical reports and monitoring reports. The WDRs and Title 27 regulations require that, after confirmation of a release, the Discharger prepare and submit an Evaluation Monitoring Program (EMP plan) to assess the nature and extent of the release. The Discharger has 90 days after approval of the EMP plan to complete this assessment and submit the results (i.e., an EMP report) to the Regional Board. Concurrent with the EMP report, Title 27 requires that the Discharger submit an engineering feasibility study (EFS) report and a corrective action program (CAP plan). The EFS report, at a minimum, must provide a detailed description of the corrective action measures that could be taken to achieve background concentrations for all constituents of concern. The CAP plan must describe which corrective action measures will be taken to achieve compliance.

After the confirmation of a release to groundwater in 2002, Regional Board staff approved the operator's EMP work plan in a 6 March 2003 letter. Staff requested that the operator submit the EFS, EMP report and a proposed CAP by 23 June 2003. The operator failed to submit these technical reports and failed to respond to a 7 July 2003 follow-up staff letter requesting the reports.

In addition to these technical reports, the operator recently failed to submit the Second Semester, 2004 groundwater monitoring report and the 2004 Annual Monitoring Summary report, both of which were required to be submitted by January 2005 under the Monitoring and Reporting Program of the WDRs. Board staff is proceeding with a separate enforcement action on these reporting violations.

Violation of Section 13267 Order

On 22 August 2003, the Regional Board's Executive Officer issued a California Water Code Section 13267 Order to the operator for the EFS, including the EMP report and proposed CAP. The Section 13267 Order specified that the operator submit the past due reports by 29 August 2003. The Order warned that failure to submit technical reports within the time periods specified may lead to additional enforcement activities, including the imposition of administrative civil liability under CWC Section 13268. The operator failed to submit the reports. In a 29 August 2003 letter, the operator's attorney requested an unspecified extension of the due date. This letter and one concurrently received from the operator indicated that, with the exception of onsite monitoring, the operator had not yet implemented the EMP. Staff denied the extension request.

The operator continued to violate the Section 13267 Order despite subsequent staff requests on 15 March 2004 (staff enforcement letter regarding monitoring and reporting deficiencies), 27 April 2004 (telephone conversation with operator), 18 May 2004 (copy of letter to owner's attorney summarizing violations sent to operator), 1 November 2004 (staff enforcement letter warning

of further enforcement action for failure to submit the EFS) and 20 January 2005 (second Notice of Violation for failure to submit EFS).

Administrative Civil Liability Complaint Order No. R5-2005-0503

On 3 March 2005, the Executive Officer issued a \$50,000 ACL Complaint (Order No. R5-2005-0503) to Florin Perkins Inc. for violation the Section 13267 Order. The ACL Complaint named only the operator because information provided by the attorney for the property owners indicated that site operations were, by written contract, under the exclusive control of FPLI and that the violation was the result of FPLI's inaction.

ACL Amount

In determining the amount of any civil liability pursuant to CWC Section 13327, the Regional Board must take into account the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and other matters as justice may require.

These factors were considered for the Section 13267 Order violation as follows:

Nature and Circumstances

The nature of the violation is the failure to submit a technical report (i.e. an engineering feasibility study) in response to a CWC Section 13267 Order. The Section 13267 Order specified a due date of 29 August 2003. The operator failed to submit the EFS (i.e. including evaluation monitoring results, an evaluation of remedial options and a corrective action plan) within this time period and to date has not submitted the EFS.

The circumstances are that groundwater monitoring results confirmed a release at the site in 2002. The operator submitted, and Regional Board staff approved, an evaluation monitoring program (EMP) work plan to investigate the release. The operator failed to implement the EMP except for continuing its routine onsite groundwater monitoring. As a result, the operator failed to submit the required EFS (including an evaluation monitoring report, an evaluation of remediation options and a corrective action plan). The operator was aware of its obligation under the WDRs and Title 27 regulations to investigate the release and propose remedial measures. The operator was also aware of the due dates for the EFS as set in staff enforcement letters and the Section 13267 Order. Notwithstanding, the operator failed to submit the EFS in violation of the Order.

Extent

The extent of the violation is that as of 28 April 2005, the EFS was 608 days past due.

Gravity

Because the operator did not implement the EMP and did not submit the groundwater investigation results, the nature and extent of the release is still unknown. Because the operator did not prepare and submit the EFS, remedial options have not been identified and evaluated. As a result, groundwater impacts continue at the site with no plan for corrective action.

Ability to Pay/Continue in Business

With respect to the violator, it has not been demonstrated that there is an inability to pay or to continue in business. The operator was informed of the opportunity to provide such information when it received the ACL Complaint.

Voluntary Cleanup Efforts Undertaken

Since the implementation of evaluation monitoring and submission of the EFS were required under WDRs, this factor is not directly relevant.

Degree of Culpability

Under the WDRs, the operator was responsible for ensuring that only inert wastes were discharged to the landfill. The compliance history for the site, however, shows that the operator has previously discharged non-inert wastes to the landfill in violation of the WDRs (e.g. wood, green waste, grout slurry). Further, the groundwater impacts detected in compliance wells at the site (i.e., Freon 11 and elevated TDS) are from non-inert wastes (or landfill gas generated by non-inert decomposable wastes), indicating that non-inert wastes were discharged to the landfill or from other site operations (e.g., transfer station, materials recovery facility, soil blend operation, and chip and grind facility).

The operator was also aware of the due date for the EFS when the EMP was approved and was aware that the EMP needed to be implemented before the EFS could be prepared. The operator knowingly failed to implement the EMP and failed to submit the EFS by its original 23 June 2003 due date. The operator was also made aware of the due dates for the EFS in staff enforcement letters subsequently issued and in the Section 13267 Order. To date, the EFS has not been submitted and is about 20 months past due.

The operating agreement between the owner and operator (April 1993 *Agreement for Operation of Landfill*) specified that the operator would, at its sole discretion and at its sole cost and expense, manage and operate the landfill without direction or control by the owners. As landfill operator, Florin Perkins Landfill, Inc. therefore had exclusive control of the discharge of wastes to the landfill and other site operations. The operator was, therefore, culpable for the violations.

Economic Savings

The operator has realized economic savings by failing to implement the EMP and by failing to prepare and submit the EMP report, EFS and CAP by the 29 August 2003 due date under the Section 13267 Order. At a minimum, the operator has accrued interest savings on the cost of the EMP investigation, EMP report, the EFS and the CAP by the delay. The operator also accrued interest savings on the cost of implementation of the EFS and CAP by the delay. As of 28 April 2005, the operator has been in violation of the Section 13267 Order for 608 days. Staff estimates the cost of implementing the EMP investigation (excluding groundwater monitoring of existing onsite wells under the MRP) and preparing the EMP report to be about \$20,000. Staff further estimates the cost of preparing the EFS and CAP to be about \$10,000. Based on a 608 day delay and an interest rate of 5 percent per annum, staff estimates that the operator accrued interest savings of about \$2,500 by deferring costs associated with implementing the EMP investigation and preparing the EMP report, EFS and CAP. The costs of implementing the EFS and CAP cannot be estimated because they are dependent on the EFS and

CAP, which were not submitted. Cost savings from delayed implementation of corrective action measures (i.e. landfill gas controls) of \$5,000 were assumed. The total estimated cost savings accrued by the operator by the delays is estimated to be a minimum of **\$7,500**. Further, it should be noted that the delays, in part, resulted in eviction of the operator by the owner, potentially saving the operator the entire cost of remedial investigation and cleanup.

Other Matters as Justice May Require

Staff expended approximately 160 hours, or \$12,800 in staff costs, in generation of the ACL Complaint and preparation of the agenda material for the Regional Board presentation.

Prior History of Violations

The operator has a long history of violations of its WDRs, including, but not limited to, the following:

- a. Discharge of unauthorized wastes to the landfill, including non-inert solid wastes (e.g. green waste, wood, levee grout, and ash) and semi-solid/liquid wastes (e.g. cement slurry and mud);
- b. Failure to remove unauthorized wastes from the landfill;
- c. Failure to conduct groundwater monitoring;
- d. Failure submit groundwater monitoring and technical reports;
- e. Discharge of wastes to ponded water; and
- f. Failure to maintain precipitation and drainage controls.

Some of these are continuing violations (e.g. discharge of non-inert clay, ponding and failure to grade site for drainage).

During the past year and a half, the operator was also in violation of its WDRs and subsequent cease and desist order at the adjacent Jackson Road landfill. These violations are the subject of a separate ACL complaint.

Determination of Amount

CWC Section 13268(b)(1) authorizes Administrative Civil Liability not exceeding one thousand dollars (\$1,000) for each day of a violation of a CWC Section 13267 Order. In this case, the violation is for failure to submit the EFS report. As of 28 April 2005, the EFS report is 608 days late. The maximum liability for the nonsubmittal of this technical report is therefore six hundred and eight thousand dollars (\$608,000). No minimum liability is required to be imposed under Section 13268(b)(1).

Response to Comments

One comment letter was received regarding the Florin Perkins Landfill ACL Complaint. This letter and additional documents are included as part of this agenda item. The operator's attorney submitted the letter on behalf of FPLI. In the letter, FPLI argued that the Executive Officer was mistaken to conclude that FPLI had exclusive control of landfill operations, and implied that the owner should have been included in the Complaint. The owner addressed the issue of responsibility for landfill operations and regulatory compliance in its responses (attached) to the first ACL Complaint issued on Jackson Road Landfill, which had named both the owner and the operator. The owner stated that, pursuant to the operating agreement for the Jackson Road and Florin Perkins Landfills executed by the parties in April 1993, Florin Perkins Landfill, Inc. had an exclusive right for landfill operation and

was expressly required to perform all activities associated with the landfills. The agreement specified that the operator would in its sole discretion and at its sole cost and expense, manage and operate the landfill without direction or control by the owners. The owner also pointed out that it had to commence formal eviction proceedings and evict the operator to gain possession and control of the site.

The Executive Officer did not amend or re-issue the ACL Complaint based on the comments received from the operator. The issue of culpability between the owner and operator for the violations is considered above in the "Degree of Culpability" section. Consistent with the ACL Complaint, the proposed ACL Order names the operator, but not the owner.

The operator has requested a hearing on the matter but has waived the 90-day requirement for a hearing (per CWC Section 13323(b)) to allow the Executive Officer time to re-evaluate the issues. Although the operator waived its right to a hearing within 90 days, the hearing was scheduled as proposed in the ACL Complaint.

The operator also requested that the Regional Board refer the matter to mediation (per Section 648.6, Title 23, California Code of Regulations).

The operator requested copies of all documents and correspondence relevant to the Complaint submitted by the owner and other interested parties. These documents were subsequently provided to the operator.

Summary

The operator's failure to comply with the WDRs and Section 13267 Order has serious consequences. Because the operator failed to investigate the groundwater release and submit the results, the nature and extent of the release is still unknown. The onsite source of the release also has not been investigated or controlled. Because the operator did not prepare and submit the EFS, remedial options have not been identified and evaluated. As a result, groundwater impacts continue at the site with no plan for corrective action. The operator's failure to investigate the release and submit the EFS demonstrates the operator's ongoing recalcitrance with regard to complying with Orders of the Regional Board.

The Executive Officer issued the Administrative Civil Liability Complaint in the amount of \$50,000, and staff recommends that the Regional Board adopt an ACL Order for this same amount.

Attachments:

Jeffory J. Scharff, Attorney for owners, letter to Thomas R. Pinkos, 22 February 2005
Excerpt from Agreement for Operation of Landfill, pages 1 to 7, 29 April 1993
Nancy C. Cleavinger letter to Thomas R. Pinkos, 22 February 2005
Louis A. Gonzalez, Jr., Attorney for operator, two letters to Steve Rosenbaum, 31 March 2005